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In the Supreme Court of the United States

OCTOBER TERM, 1974

JOHN T. DUNLOP, SECRETARY OF LABOR, AND CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANTS

v.

TURNER ELKHORN MINING CO., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

JURISDICTIONAL STATEMENT

ROBERT H. BORK,
Solicitor General,
IRVING JAFFE,
Acting Assistant Attorney General,
FRANK H. EASTERBROOK,
Assistant to the Solicitor General,
STEPHEN F. EILPERIN,
THOMAS G. WILSON,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

WILLIAM J. KILBERG,
Solicitor of Labor,
MARSHALL H. HARRIS,
Associate Solicitor,
MARK E. SOLOMONS,
FRANK A. WHITE,
Attorneys,
Department of Labor,
Washington, D.C. 20210.

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OPINION BELOW

The opinion of the district court (App. A, *infra*, pp. 1A–13A) is reported at 385 F. Supp. 424.

JURISDICTION

The judgment of the district court (App. B, *infra*, pp. 14A–15A) was entered on November 20, 1974. Appellants' motion to amend the judgment (App. C, *infra*, pp. 16A–17A), filed on December 2, 1974, was denied on December 18, 1974 (App. E, *infra*, pp. 29A–30A). Appellants' notice of appeal to this Court was filed on January 16, 1975 (App. F, *infra*, p. 31A). By order of March 10, 1975, Mr. Justice Stewart ex-

tended the time in which to docket this appeal to and including April 16, 1975. The jurisdiction of this Court is conferred by 28 U.S.C. 1252 and 1253.

QUESTIONS PRESENTED

1. Whether Section 411(c)(3) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 921 (c)(3), which provides for compensation to miners with complicated pneumoconiosis whether or not the miner is functionally disabled, is consistent with the Constitution.

2. Whether Congress, which created in Section 411 (a)(4) of the Act, as amended, 30 U.S.C. (Supp. II) 921(c)(4), a presumption that a miner who has worked 15 or more years in coal mines and who has a totally disabling respiratory or pulmonary impairment is totally disabled due to pneumoconiosis, violated the Constitution by providing that the presumption may be rebutted only by evidence that the miner did not have pneumoconiosis, or that the impairment did not arise out of employment in a coal mine.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution provides in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *.

2. Section 411(c) (3) and (4) of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. (Supp. II) 921(c) (3) and (4) provides:

> (c) For purposes of this section—
>
> * * * * *

> (3) if a miner is suffering or suffered from a chronic dust disease of the lung which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B) if diagnosis had been made in the manner prescribed in clause (A) or (B), then there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis or that at the time of his death he was totally disabled by pneumoconiosis, as the case may be; and
>
> (4) if a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest roentgenogram submitted in connection with such miner's, his widow's, his child's, his parent's, his brother's, his sister's or his dependent's claim under this title and it is interpreted as negative with respect to the requirements of paragraph (3) of this subsection, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis. In the case of a living miner,

a wife's affidavit may not be used by itself to establish the presumption. The Secretary shall not apply all or a portion of the requirement of this paragraph that the miner work in an underground mine where he determines that conditions of a miner's employment in a coal mine other than an underground mine were substantially similar to conditions in an underground mine. The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.

STATEMENT

Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 792, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, 30 U.S.C. 901 *et seq.*, provides for the payment of benefits to coal miners suffering from pneumoconiosis. Under Title IV of the Act, coal mine operators are liable for the payment of certain benefits to miners they have employed. 30 U.S.C. 932.

This suit was brought by 22 coal mine operators against the Secretary of Labor and the Secretary of Health, Education, and Welfare seeking injunctive and declaratory relief from the operation of various portions of Title IV. Plaintiffs alleged that the Act violated their rights under the Fifth Amendment.[1]

[1] The complaint also challenged the legality of certain regulations promulgated by the Secretary of Labor pursuant to the Act. The three-judge district court declined to entertain these allegations, and remanded them to the single district judge for disposition. Although the court's pendant jurisdiction would have enabled it to consider these allegations (*Santin Ramos* v. *Civil Service Commission*, 376 F. Supp. 361 (D.P.R.) (three-judge court), appeal on another ground pending, No. 74-216 (relying on *Hagans* v. *Lavine*, 415 U.S. 528)), and although we believe the court should have done so in the interest of efficient judicial administration, we do not contest the remand order.

A. THE STATUTORY PROGRAM

1. The Act deals with the manifold problems of victims of black lung disease, a chronic respiratory ailment caused by the long-term inhalation of coal dust. During the hearings preceding the 1969 Act the Surgeon General estimated that pneumoconiosis affected some 100,000 of the nation's active and inactive coal miners.[2] X-ray examinations have revealed that approximately 10 percent of the nation's active miners, and approximately 20 percent of the inactive miners, suffer from the disease, and even these estimates may understate the scope of the problem.[3] Congress had before it evidence that at least 50,000 cases of black lung disease involved total disability,[4] and data from post mortem examinations indicated an even greater prevalence.[5]

[2] S. Rep. No. 91-411, 91st Cong., 1st Sess., 15; S. Rep. No. 92-743, 92d Cong., 2d Sess., 2.

[3] S. Rep. No. 91-411, 91st Cong., 1st Sess., 7; H. Rep. No. 91-563, 91st Cong., 1st Sess., 5; Hearings before the Subcommittee on Labor, Senate Committee on Labor and Public Welfare, on S. 355, Labor: Coal Mine Health and Safety, 91st Cong., 1st Sess., Pt. 2, 729-730 (hereafter cited as 1969 Senate Hearings).

[4] H. Rep. No. 91-563, *supra*, n. 3, at 17-18. House and Senate debates are reprinted, along with the House, Senate and Conference Reports in a Committee Print, Legislative History, Federal Coal Mine Health and Safety Act, House Committee on Education and Labor, 91st Cong., 2d Sess. (hereafter cited as "Leg. His.").

[5] S. Rep. No. 91-411, *supra*, n. 2, at 7 (testimony of Surgeon General).

Pneumoconiosis entails massive fibrosis of the lungs. Although in its earlier stages it does not preclude an individual from engaging in employment, it is progressive once contracted. It eventually severely limits the physical capacity of the miner and, if it does not lead directly to disability or death, it can induce death by cardiac failure and make the individual more susceptible to other causes of death, such as pneumonia.[6] Because black lung is a progressive disease its symptoms may not become visible until long after contraction can be verified by medical means, and until after termination of the employment that caused the disease.[7]

2. Congress found that state workers' compensation laws did not provide adequate coverage for black lung disease, particularly in cases where miners had ceased working before the disease became manifest.[8] In some states the time provided for claiming benefits expired before the symptoms alerted a victim that he had the disease. Other states did not provide coverage for occupational disease. Still others did not provide payments sufficient to compensate the miner.

[6] H. Rep. No. 91-563, *supra*, n. 3, at 13, 15-17; Hearings before the General Subcommittee on Labor, House Committee on Education and Labor, on H.R. 4047, Labor: Coal Mine Health and Safety, 91st Cong., 1st Sess., Pt. 1, 275-276 (hereafter cited as 1969 House Hearings); S. Rep. No. 91-411, *supra*, n. 2, at 7-8, 15; 1969 Senate Hearings, *supra*, n. 3, at Pt. 2, 694-697, 719-720, 857-858, Pt. 4.

[7] 1969 Senate Hearings, *supra*, n. 3, at Pt. 1, 491, 493, Pt. 2, 641, 694-697, 837, 857-858.

[8] 30 U.S.C. 901; H. Rep. No. 91-563, *supra*, n. 3, at 13; Leg. Hist., *supra*, n. 4, at 328.

In order to prevent the occurrence of black lung disease and ameliorate its consequences, Congress included in the Act two basic measures. First, the Act set a limit on the amount of dust that could be present in the ambient air of coal mines.[9] Cf. Section 201(b), 30 U.S.C. 841(b). Second, the Act provides that compensation shall be paid to all coal miners who are "totally disabled" by pneumoconiosis arising out of employment in coal mines, and to the surviving dependents of coal miners whose death was due to the disease. Through a series of definitions, presumptions, and methods of refutation contained in Title IV, the Act provides that any miner suffering from "complicated" pneumoconiosis—the last and terminal stage of the disease—receives this compensation whether or not he is able to engage in alternative work, whereas miners with less-advanced black lung receive compensation only if physically disabled by the disease. Because pneumoconiosis shares many of the attributes of other respiratory and pulmonary diseases, the definition of the disease is cast in generic terms, subject to refutation if a mine operator can demonstrate that the disease is not pneumoconiosis, or that the affected individual could not have acquired such a disease as a result of exposure to dust in the mines.

3. The Act divided the financial responsibility for payment of black lung benefits between the federal government (30 U.S.C. 921 *et seq.*, hereafter Part B)

[9] See Title II of the 1969 Act, 30 U.S.C. 841 *et seq.*, particularly Section 202, 30 U.S.C. 842. See generally H. Rep. No. 91-563, *supra*, n. 3, at 14-20, 40-42; S. Rep. No. 91-411, *supra*, n. 2, at 7-8, 14-21.

and the coal mining industry (30 U.S.C. 931 *et seq.*, hereafter Part C), providing two distinct programs. The federal government assumed in Part B an obligation to pay monthly benefits[10] for life to coal miners disabled by pneumoconiosis, and to surviving dependents of coal miners whose death was due to pneumoconiosis, provided claims were filed on or before December 31, 1971. The 1972 amendments extended this cutoff date to June 30, 1973,[11] and provided a "transitional" six-month federal liability for claims filed between July 1 and December 31, 1973.[12] Claims filed after July 1, 1973, are the responsibility of employers, who are required to make payments commencing January 1, 1974.[13] The current provisions of Part C provide that employer liability for these payments will last until 1981.[14] Because of the three-

[10] The amount of the benefits was established at 50 percent of the minimum monthly payment to which a totally disabled federal employee in grade GS–2 would be entitled under the Federal Employees Compensation Act (*i.e.*, $136.25 per month), 5 U.S.C. (1964 ed., Supp. V) 8112, with certain increases for up to three dependents. Section 412(a), 30 U.S.C. 922(a).

[11] Section 414(a)(1), (b), 30 U.S.C. (Supp. II) 924(a)(1), (b).

[12] Section 415, 30 U.S.C. (Supp. II) 925.

[13] Sections 421, 422, 30 U.S.C. (Supp. II) 931, 932. The 5 U.S.C. (1964 ed., Supp. V) 8112, with certain increases for substituting employer responsibility for federal responsibility was needed to give the states additional time to enact appropriate changes in their workmen's compensation laws to provide adequate coverage for pneumoconiosis. S. Rep. No. 92–743, *supra*, n. 2, at 20.

[14] Section 422(e)(3), 30 U.S.C. (Supp. II) 932(e)(3).

year statute of limitations contained in the Act, employers are responsible only for pneumoconiosis discovered after the initial passage of the Act in 1969. Section 422(f)(1), 30 U.S.C. (Supp. II) 932 (f)(1).[15]

4. An association of mine operators brought a suit challenging substantially all of the provisions of the Act and the Secretary of Labor's implementing regulations. The complaint alleged that the Act was a taking of property without just compensation, was a retroactive impairment of contracts, and deprived the mine operators of due process of law. A three-judge district court in the District of Columbia upheld most of the provisions of the Act, and this Court summarily affirmed. *National Independent Coal Operator's Association* v. *Brennan,* 372 F. Supp. 16 (D.D.C.), affirmed, October 29, 1974, No. 73–1902. Faced with a direct assault on the constitutionality of Title IV, the district court there held: "Congress had the constitutional power to enact Title IV of the Act." 372 F. Supp. at 23. Appellants' Jurisdictional Statement in No. 73–1902 contended that the presumptions and limitations on rebuttal evidence contained in Title IV are unconstitutional (J.S. 13–15), and this Court rejected that contention in its summary affirmance.[16]

[15] But see Section 415, 30 U.S.C. (Supp. II) 925, containing an exception for the six-month transitional period.

[16] Plaintiffs in the instant case have been provided copies of the Jurisdictional Statement and the government's Motion to Affirm in No. 73–1902, and the district court also had been furnished copies.

B. THE DISTRICT COURT'S DECISION

In this case a three-judge district court was convened pursuant to 28 U.S.C. 2282 and 2284. The court deferred consideration of the case until this Court had acted in *National Independent Coal Operator's, supra.* Then, upon cross-motions for summary judgment, the district court upheld most of the challenged statutory provisions,[11] but ruled that "the irrebuttable presumption set forth in 30 U.S.C. 921(c)(3) and the limitation of evidence necessary to rebut the presumption created in 30 U.S.C. 921(c)(4) are violative of the United States Constitution" (App. B, *infra,* pp. 14A–15A).

The two provisions struck down by the district court contain important definitions and presumptions.

1. Section 411(c)(3) of the Act provides that "if a miner is suffering or suffered from a chronic dust disease of the lung," shown by x-rays, by a biopsy, or by similar techniques to be characterized by massive lesions of the lung, "then there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis * * *." The district court concluded that this section "not only involves a presumption of the existence of pneumoconiosis but forecloses all fact finding as to the effect of that disease upon a particular coal miner upon a clinical finding of the presence of a chronic dust disease" and "is a departure from the overall pattern of the Act which makes the existence of both the disease and disability two (2) separate factors which must be established before liability is imposed" (App. A, *infra,* p. 9A). The court held (App. A, *infra,* p. 10A):

> To the extent that such presumption purports to mak[e] a finding of total disability in terms other than those provided by the Act as standards for total disability, it is unreasonable and arbitrary. As written, section 921(c)(3) is violative of due process in precluding the opportunity to present evidence as to the effect of a chronic dust disease upon an individual in determining whether or not he is disabled.

2. Section 411(c)(4) of the Act, 30 U.S.C. (Supp. II) 921(c)(4), provides that if a miner employed for more than 15 years in underground coal mines is unable to submit evidence satisfactory under Section 411(c)(3), but "other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment," then a rebuttable presumption arises that the disability is caused by pneumoconiosis. This presumption may be rebutted only by evidence that the miner did not have pneumoconiosis, or that his "impairment did not arise out of, or in connection with, employment in a coal mine."

The district court sustained the constitutionality of the presumption that respiratory impairments of long-time miners are pneumoconiosis, but held that the limitation upon the evidence that can be used to

[11] The plaintiffs have filed a notice of appeal from that portion of the judgment sustaining provisions of the Act. We believe that this Court already has decided the issues raised in plaintiffs' cross-appeal. See *National Independent Coal Operator's Association* v. *Brennan*, No. 73-1902, decided October 29, 1974, affirming 372 F. Supp. 16 (D.D.C.).

rebut the presumption is "invalid as arbitrary and unreasonable" (App. A, *infra,* p. 11A). The court concluded that because pneumoconiosis is not disabling *per se,* "[t]o require rebuttal evidence that a coal miner did not have pneumoconiosis is irrational where liability is not predicated on the mere presence of the disease, but rather on a complicated state of the disease"[18] (*ibid.*). The court went on: "There is no rational basis upon which the burden of proving that the impairment 'did not arise out of, or in connection with employment in a coal mine' can be placed upon a specific potentially liable coal mine operator" (App. A, *infra,* p. 12A; footnote omitted).

The government's motion to amend the judgment was denied (App. E, *infra,* pp. 29A–30A). The government's motion for a stay pending appeal (App. D, *infra,* pp. 18A–28A) also was denied (App. G, *infra,* pp. 32A–35A).

THE QUESTIONS ARE SUBSTANTIAL

The district court has invalidated on constitutional grounds two significant provisions of Title IV of the Act. As a result, certain miners afflicted with an irreversible and fatal disease would be denied the benefits Congress intended them to have.

1. In Title IV of the Act Congress declared that benefits should be paid to miners who have been disabled by pneumoconiosis. Section 411(c)(3) of the Act provides that miners who have been diagnosed

[18] The district court inaccurately characterized the scope of Section 411(c)(4), which, unlike Section 411(c)(3), is not restricted to "a complicated state of the disease."

as having complicated pneumoconiosis are "irrebuttably presumed" to be totally disabled due to pneumoconiosis, or (if deceased) to have died because of pneumoconiosis.[19]

a. The rule contained in Section 411(c)(3) is supported by testimony before Congress that complicated pneumoconiosis is an irreversible and fatal stage of coal workers' pneumoconiosis.[20] On the basis of that testimony, Congress was entitled to conclude that all such afflicted miners should be classified as "disabled" for compensation purposes. The legislative history

[19] "For purposes of this subsection, any individual who suffers from complicated pneumoconiosis shall be deemed to be totally disabled." H. Conf. Rep. No. 91-761, Leg. Hist., *supra,* n. 4, at 1064.

[20] Dr. William H. Stewart, former Surgeon General of the United States, stated:

"In its advanced form, it [pneumoconiosis] leads to severe disability and premature death."

1969 Senate Hearings, *supra,* n. 3, at 719.

Similarly, Dr. Leon Cander, Chairman of the Department of Medicine of the University of Texas Medical School, an acknowledged expert in pulmonary medicine, testified:

"Once progressive massive fibrosis develops there is no way to prevent its relentless progress. If you remove the miner from the mine, it does not matter; the disease progresses.

* * * * *

"Patients with progressive massive fibrosis, however, usually die of either pulmonary insufficiency or heart failure caused by pulmonary disease." *Id.* at 858.

As Congressman Dent noted, "when the victim reaches the fourth stage, known as progressive massive fibrosis or complicated pneumoconiosis * * * he has a fatal, uncurable and irreversible disease. At that time he is destined to die from the disease." Leg. Hist., *supra,* n. 4, at 693.

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demonstrates that Congress intended to compensate all miners who suffered from the terminal disease of complicated pneumoconiosis, including the few miners who retained some ability to work. Although complicated pneumoconiosis "usually produces marked pulmonary impairment and considerable respiratory disability,"[21] Congress was aware that there are "patients with progressive massive fibrosis with mild pulmonary function changes and little or no disability."[22] In enacting 411(c)(3), Congress made the legislative judgment that a miner whose lungs had been largely destroyed by massive lesions caused by black lung disease, and who therefore was incurably ill, should be compensated even before the disease had so progressed that he was completely unable to work.

This case therefore involves a straightforward legislative judgment defining who is to be compensated. It does not, as the district court believed, present an unconstitutionally expansive "presumption," or an unjustifiable limitation upon the right of a litigant to introduce relevant evidence.

b. Congress possesses the power to decide that miners suffering from the terminal condition described in Section 411(c)(3) of the Act should be compensated. Section 4 of the Act, 30 U.S.C. 803, provides that the Act applies to "[e]ach coal mine, the products of which enter commerce or * * * affect commerce * * *."

[21] H. Rep. No. 91-563, *supra*, n. 3, at 13.

[22] 1969 Senate Hearings, *supra*, n. 3, at 858.

This Court repeatedly has upheld Congress' power, under the Commerce Clause, to regulate working conditions provided by private employers and the compensation of their employees laboring in industries affecting commerce, even though the particular activities Congress regulates are not "in" interstate commerce. See, *e.g.*, *Katzenbach* v. *McClung*, 379 U.S. 294, 303–304 (restaurant service); *United States* v. *Darby*, 312 U.S. 100 (Fair Labor Standards Act); *Southern Ry. Co.* v. *United States*, 222 U.S. 20 (Safety Appliance Act may constitutionally be applied to intrastate train movements). Congress similarly possesses the power to prescribe schedules of benefits to be paid to miners who incur occupational diseases because of employment in an industry affecting commerce.

Compensation schemes of the sort established by Title IV often are termed "schedule benefits," and they are embodied in most state workmen's compensation laws, as well as the Longshoremen's and Harbor Workers' Compensation Act.[23] Under such laws specified benefits are payable for certain employment-related injuries without regard to the affected employee's total or partial disability for work, or loss of wages, or wage earning capacity.[24]

This Court has upheld the constitutionality of workmen's compensation provisions that provide benefits based upon a medical condition rather than current inability to work. *New York Central R.R. Co.* v.

[23] 33 U.S.C. 908(c).

[24] 2A Larson, *The Law of Workmen's Compensation*, § 58.19, *et seq.* (1975).

Bianc, 250 U.S. 596, sustained a New York statute conferring benefits upon employees who suffered an employment-related facial disfigurement but no loss of ability to work. See also *Arizona Employers' Liability Cases,* 250 U.S. 400, 433 (opinion of the Court; Holmes, J., concurring). In *Urie* v. *Thompson,* 337 U.S. 163, 181–187, the Court held that occupational diseases were compensable as "injuries" under the Federal Employer's Liability Act, whenever the disease "impairs or destroys an employee's health" (id. at 186). The court intimated no doubt about the constitutionality of compensation for such impairments. *A fortiori,* Congress has the power to direct that miners be compensated for a reduction of their life spans because of complicated pneumoconiosis arising out of their employment in coal mines.

c. Nevertheless, the district court held that Section 411(c)(3) is unconstitutional because it erects an "irrebuttable presumption" of disability, whether or not a miner is actually disabled by complicated pneumoconiosis. The district court's characterization of the section is inaccurate. Although Section 411(c)(3) uses the words "irrebuttably presumed," it does not create a presumption within the meaning of the irrebuttable presumption cases. Cf. *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632, 644–646. Congress has simply used a form of legislative shorthand to indicate that all miners with complicated pneumoconiosis, a terminal and irreversible disease, are to be compensated whether or not they are still able to work.

Section 411(c)(3) provides that all miners afflicted with complicated pneumoconiosis shall be treated as if they were totally disabled, as that term is used elsewhere in the statute. It does not presume, irrebuttably or otherwise, that these miners are presently unable to work, and that because of this hypothetical disability they should receive certain treatment.[25] In other words, Section 411(c)(3) is not a legislative decision that, contrary to fact, all miners afflicted with complicated pneumoconiosis are totally disabled physically. It expresses instead a legislative judgment that all miners with complicated pneumoconiosis should receive compensation. In the context of the Act, denominating all such miners "totally disabled" produces that result.[26]

It is not material to the Act's constitutionality that Congress chose to use this shorthand method of expression. Congress, as we have shown, has the power under the Constitution to provide that all miners suffering from complicated pneumoconiosis shall be compensated whether or not currently disabled, and the validity of the exercise of this power does not turn on the form of expression Congress used to accomplish this result.

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[25] If it created such a presumption it would have to be analyzed, as the irrebuttable presumption cases have done, to determine whether the presumption is rational or whether it is overbroad or oppressive. Cf. Note, *The Irrebuttable Presumption Doctrine in the Supreme Court,* 87 Harv. L. Rev. 1534 (1974).

[26] Indeed, under the Act's definition section, 30 U.S.C. (Supp. II) 902(f), "total disability" is a statutory term of art which is not synonymous with total inability to work. See 20 C.F.R. 410.412(a)(2).

2. Section 411(c)(4) of the Act provides that a miner employed for 15 years or more in a coal mine, but unable to qualify for benefits under the rule of Section 411(c)(3), is rebuttably presumed to be (or, if deceased, to have been) totally disabled because of pneumoconiosis, if he can present evidence of a totally disabling respiratory or pulmonary impairment.[27] Unlike Section 411(c)(3), which creates a rule of substantive law, this section creates an evidentiary presumption in cases where a miner cannot demonstrate that his pneumoconiosis has reached the progressive or complicated stage. The miner (or the Secretary in his stead) must prove lengthy employment, the presence of a respiratory disease, and total disability. A presumption then arises that the disease is pneumoconiosis. The section then provides that this presumption can be rebutted "only" by evidence that the miner did not have pneumoconiosis or that the impairment did not arise out of employment in a coal mine.[28]

The district court held this provision arbitrary and unreasonable because it forecloses evidence that would refute total disability. This holding is based upon a misreading of Section 411(c)(4). Because the claimant must establish total disability before the presump-

[27] This provision was added in 1972, in part to make it clear that benefits should not be denied solely on the basis of a negative x-ray. S. Rep. No. 92-743, *supra*, n. 2, at 12-13. Congress was specifically aware that a miner could be totally disabled from pneumoconiosis even though the disease did not appear in x-rays. *Id.* at 8-12.

[28] Although this provision, by its terms, applies to the Secretary of Health, Education and Welfare, it also applies to coal operators by virtue of 30 U.S.C. (Supp. II) 925 and 932.

tion of pneumoconiosis arises, the "only" clause does not operate until all evidence relevant to disability has been received. The section does not preclude a mine operator from demonstrating that the claimant is not disabled. Proof of total disability is a condition precedent to the operation of the rebuttable presumption, and the government has so construed it.[29] The district court's constitutional conclusion must fall once its statutory misapprehension is corrected.[30]

3. For the reasons we have discussed above, the district court's invalidation on constitutional grounds of these federal statutory provisions was incorrect. Moreover, the court should not have reached this decision after this Court's summary affirmance in *National Independent Coal Operator's, supra.* The complaint in that case had challenged on constitutional grounds all of the black lung benefits provisions of the Act, and had asserted the ground upon which the court below acted—that the "presumptions" of Title IV transgressed the Constitution because there is "no

[29] The regulations implementing the Act provide that unless a miner must establish "total disability" either by the irrebutable presumption contained in Section 411(c)(3) or by other sufficient factual showing. 20 C.F.R. 410.412, 410.422-410.426; 20 C.F.R. Part 718

[30] The district court also concluded that Section 411(c)(4) is irrational because it places upon a specific coal mine owner the burden of proving that the respiratory or pulmonary disease arose out of coal mine employment. But the Section imposes no such burden. It provides only the manner in which the presumption contained in Section 411(c)(4) can be rebutted. The operator also can defeat liability by proving that the disability did not arise, at least in part, out of employment in his mines. 30 U.S.C. 932(c).

rational connection in common experience between the fact proved and the ultimate fact presumed" (J.S. 15). The district court rejected these contentions and broadly upheld Title IV. Appellants in that case raised the contentions again in their Jurisdictional Statement, although they did not specifically challenge the rule of Section 411(c)(3). The government's Motion to Affirm (at pp. 12–13) specifically addressed the rebuttable presumption of Section 411(c)(4), and this Court affirmed.

If this Court's affirmance decided all issues raised in the complaint and covered by the district court's judgment [31] (see *Fusari* v. *Steinberg*, No. 73–848, decided January 14, 1975, slip op. 2 (Burger, C.J., concurring)), then it already has decided all the issues of this case adversely to plaintiffs here.[32] If, however, the summary affirmance reached only the issues specifically joined in the Jurisdictional Statement and the Motion to Affirm, then it has not yet passed upon the constitutionality of the rule in Section 411(c)(3).

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted. In light of the importance of this case to the beneficiaries, the precedents governing the

[31] The district court's formal judgment in *National Independent Coal Operator's* simply granted summary judgment for the government in all particulars. It therefore held against plaintiffs on all of the allegations raised in their complaint.

[32] Of course, the Court has not passed upon the constitutionality of Section 411(c)(4) as *mis*construed below, for neither plaintiffs in No. 73–1902 nor the District Court for the District of Columbia shared that misconception.

constitutional issues presented, and the summary affirmance earlier this Term in *National Independent Coal Operator's*, the Court may wish to consider summary reversal.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

IRVING JAFFE,
Acting Assistant Attorney General.

FRANK H. EASTERBROOK,
Assistant to the Solicitor General.

STEPHEN F. EILPERIN,
THOMAS G. WILSON,
Attorneys.

WILLIAM J. KILBERG,
Solicitor of Labor,

MARSHALL H. HARRIS,
Associate Solicitor,

MARK E. SOLOMONS,
FRANK A. WHITE,
Attorneys,
Department of Labor.

APRIL 1975.

570-762—75——4

APPENDIX A

In the United States District Court for the Eastern District of Kentucky
Pikeville
Civil Action No. 1761
(Filed, Nov. 19, 1974, at Frankfort, Davis T. McGarvey, Clerk, U.S. District Court)

TURNER ELKHORN MINING COMPANY, A KENTUCKY CORPORATION, ET AL., PLAINTIFFS

v.

PETER J. BRENNAN, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR, AN AGENCY OF THE FEDERAL GOVERNMENT, AND CASPER W. WEINBERGER, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, AN AGENCY OF THE FEDERAL GOVERNMENT, DEFENDANTS

MEMORANDUM OPINION

Before LIVELY, *Circuit Judge*, and MOYNAHAN and HERMANSDORFER, *District Judges*.

This action constitutes a facial attack upon the constitutionality of portions of Subchapter IV, Black Lung Benefits, of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. 91–173, Dec. 30, 1969, 83 Stat. 792, as amended by the Black Lung Benefits Act of 1972, Pub. L. 93–303, May 19, 1972, 86 Stat. 925, 30 U.S.C. 901 *et seq.* Plaintiffs are twenty-two (22) coal mine operators who charge the Act violates rights secured under the Fifth Amendment to the Federal Constitution. The defendants are the Secretaries of the United States Departments of Labor and Health, Education and Welfare.

Jurisdiction is invoked and found under 28 U.S.C. 2282. Such jurisdiction is limited to a consideration of the Act and does not extend to a consideration of administrative regulations, *William Jameson & Co.* v. *Morgenthau,* 307 U.S. 171 (1939); *Sardino* v. *Federal Reserve Bank of New York,* 361 F. 2d 106 (1966), cert. denied 385 U.S. 898 (1966), which are within the jurisdiction of a single judge court. Further, we consider only the facial attack made upon portions of the Act and not its implementation to any specific claim for benefits.

Perspective may be had in considering the questions presented by first noticing the general legislative plan incorporated in the Federal Coal Mine Health and Safety Act as amended. The Act is structured in terms of a preamble and five (5) major subchapters, each of which is devoted to a separate legislative concern. Our present efforts are concerned only with portions of Subchapter IV. This subchapter, denominated "Black Lung Benefits", is comprised of three (3) primary subdivisions entitled respectively "Part A—General Provisions"; "Part B—Claims for Benefits Filed On Or Before December 31, 1972"; and, "Part C—Claims for Benefits After December 31, 1972". Of these subdivisions our attention is directed to Parts B and C only.

Part B of Subchapter IV deals principally with benefits for total disability or death arising from pneumoconiosis which are to be determined and paid by the Federal Government. Eligibility and standards for processing claims are provided by sections 921 through 924. The final section in Part B, section 925, establishes a transition period, June 30, 1973 to December 31, 1973, during which federal participation as payee of benefits is phased out and state administration of liability through workmen's compensation

coverage with federally approved standards, 30 U.S.C. 931, or direct liability on coal mine operators, 30 U.S.C. 932, is assumed.

Part C directly deals with conditions under which the Secretary of Labor will certify state workmen's compensation laws as complying with federal standards, or, if such compliance is not found, imposition of liability on the coal mine operators. In the circumstance of direct liability upon a coal mine operator, the Act specifically recognizes the requirement of an employment nexus between the coal miner or those claiming in respect of a deceased coal miner and the particular coal mine operator against whom the claim is made. Pursuant to Part C, section 932(a), liability devolves to such operator "with respect to death or total disability due to pneumoconiosis *arising out of employment in such coal mine*"; and, under section 932(*c*), it is provided that there is *no liability* on such operator for benefits "*due to pneumoconiosis which did not arise, at least in part, out of employment in such mine during the period when it was operated by such operator*".[1] (Emphasis added)

Further, claims must be filed within the limitations period established by the Act. Under Part B a claim must be filed generally by December 31, 1973; the exceptions may result in an extension of six (6) months from December 31, 1973 under sections 922 (a)(3), 924. Part C requires the claim to be filed within three (3) years of the discovery of total disability or of death from pneumoconiosis, section 931 (b)(2)(D), except in the case of a living miner whose

[1] This may include liability from a prior operator's business if such prior operator operated the coal mine on or after December 30, 1969, the effective date of the Act. The prior operator is not, however, relieved of liability by this provision. 30 U.S.C. 932(i)(2).

eligibility is established under section 921(c)(4) where the claim of miners engaged in coal mining for more than fifteen (15) years must be filed within three (3) years of the last exposure to disease employment, or in the event of death, within fifteen (15) years of the last exposure employment. 30 U.S.C. 932(f)(1)(2).

Argument is made that the statutory scheme outlined for assessing liability on the coal mine operator for those miners no longer in the work force is irrational and amounts to reparations in favor of the coal miners against the coal industry. The rational approach, argue plaintiffs, is the workmen's compensation approach where the risk of injury or disease is insured against during the employee's period of employment and the economic burden thereby incurred is spread to the public through the pricing mechanism. To impose what plaintiffs believe will be a severe economic burden on the coal industry for total disability or death arising from periods of employment of miners when the disease has not been recognized [2] and no methods of protecting the industry from that risk were taken, is argued as constitutionally impermissible. Plaintiffs cite a multi-issue railroad pension case, *Retirement Board* v. *Alton R. Co.*, 295 U.S. 330 (1935), which held that a requirement for interstate carriers to pay a retirement allowance to persons who were in the service within one (1) year of the Act was arbitrary and unreasonable. Mr. Chief Justice Hughes and those justices joining him in dissent did, in fact, concur in the majority's holding on that particular question. 295 U.S. 389. We hold, however,

[2] There was testimony and information, eg. Senator Javits, to the effect that pneumoconiosis was not recognized in the United States until the mid-1950's. *1969 Legislative History 33.*

that the *Alton* decision is distinguishable. There, any person who was employed within one (1) year of the date of the Act was to be awarded benefits even though such person may have been discharged for cause or severed employment for a reason incompatible with the imposition of implied *quasi-contract* responsibility to pay such allowance for retirement. The Court in *Alton* recognized a fundamental difference between compensation type laws which deal with existing rights and liabilities and the Act there under consideration which sought to impose "a new incident, without reference to any existing obligation or legal liability", upon the employer-employee relationships. 295 U.S. at 369–71. In the instant case the Act imposes liability upon a coal operator only if standards sounding in tort are met: (1) a claim is timely filed; (2) a prior employment nexus is established; (3) the claim is based on pneumoconiosis arising, at least in part, from such employment; and (4) the coal miner has become totally disabled or has died from pneumoconiosis. Those factors not only distinguish *Alton, supra,* but manifest a logical and rational basis for the assertion of liability.

In assessing the argument against imposition of remote claims where the responsible party did not insure against that particular risk because it was unknown to the coal industry at large, we are not persuaded that fact makes the Act unreasonable. Clearly, plaintiffs have cited no binding or persuasive authority showing that such liability for remote claims violates safeguards of the Federal Constitution. This Court may not, under *U.S.* v. *Carolene Products Co.*, 304 U.S. 144, 145 (1938), superimpose its judgment on that of Congress:

> * * * where the legislative judgment is drawn into question, [judicial inquiry] must be restricted to the issue whether any state of

> facts either known or which could reasonably be assumed affords support for it. * * * As that decision was for Congress, neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it.

We find that the manner in which liability is assessed is rational, and the decision of Congress to impose it on what may be called remote claims of those former miners no longer in the work force was an exercise of its lawful power under the Constitution.

The statutory manner of imposing and implementing such liability as the Act imposes upon coal mine operators under the Act presents a separate and distinct issue of several parts.

First, the Act identifies a particular disease which, when manifest in an advanced state in coal miners, may cause total disability or death. There is no doubt that the Congress elected to avoid precise medical terminology in defining pneumoconiosis, section 902(b):

> The term "pneumoconiosis" means a chronic dust disease of the lung arising out of employment in a coal mine.

No meaningful argument has been presented challenging the power of Congress to make such definition after receiving conflicting medical evidence about the disease.[3] The naming of the disease or its components in this instance is of more academic than legal significance. *U.S.* v. *Carolene Products Co., supra.* We hold the definition is neither arbitrary nor unreasonable.

Second, under part B of the Act at section 921(c)

[3] The committee reports abound with such conflict. A summary is presented in *U.S. Code, Cong. and Admin. News,* 92d Cong., Second Session, 1972, p. 2315.

there are four (4) statutory presumptions made in aid of a claimant's efforts to secure benefits. Plaintiffs have standing to attack these presumptions under section 925 where the Secretary's findings of liability during the transition are binding on the operators and, as to the last presumption, under section 932(f)(2), where it is specifically incorporated into Part C as a basis for benefit eligibility. The provisions of section 921(c) are:

> For the purposes of this section—
>
> (1) if a miner who is suffering or suffers from pneumoconiosis was employed for ten years or more in one or more coal mines there shall be a rebuttable presumption that his pneumoconiosis arose out of such employment;
>
> (2) if a deceased miner was employed for ten years or more in one or more coal mines and died from a respiratory disease there shall be a rebuttable presumption that his death was due to pneumoconiosis;
>
> (3) if a miner is suffering or suffered from a chronic dust disease of the lung which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by either means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B), then there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis, as the case may be; and
>
> (4) if a miner was employed for fifteen years or more in one or more underground coal mines,

> and if there is a chest roentgenogram submitted in connection with such miner's * * * claim under this title, and it is interpreted as negative with respect to the requirements of paragraph (3) of this subsection, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, or that at the time of this death he was totally disabled by pneumoconiosis. * * * The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.

Plaintiffs make the argument that the presumptions presented by statute are irrational and amount to de facto irrebuttable presumptions. In *Tot* v. *United States*, 319 U.S. 463 (1943), the Court, relying upon its decision in Mobile, *J. & K. C. R. Co.* v. *Turnipseed*, 219 U.S. 35 (1910), held that the controlling test for determining the validity of a statutory presumption was "that there be a rational connection between the facts proved and the facts presumed". 319 U.S. at 467. The Court wrote:

> Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed. See *Leary* v. *United States*, 395 U.S. 6, 33 (1969).

The function of a rebuttable presumption is simply to shift the burden of proof. We do not doubt that Congress has the power to make such presumptions.

In the medical testimony received by the Congress there was no significant disparity as to the fact that exposure in a coal mine for a period of ten (10) years

would typically present a medically identifiable case of advanced or complicated pneumoconiosis. Thus, a rebuttable presumption that after ten (10) years, as established in presumptions (1) and (2) of section 921(c), a coal miner has pneumoconiosis arising from his employment may be sustained; provided, that in the case of a coal miner with multiple employer experience of a period of ten (10) or more years, the presumption is not used as a basis for identifying one of such employers as being responsible under the Act. Such a determination involves fact questions which were not, or hardly could be, established before the Congress. Curiously, Congress did not legislate directly upon this critical selection process or establish standards for rule making, but rather, delegated the entire problem to the Secretary of Labor. 30 U.S.C. 932(h). There is no dispute that Congress has the power to make such a delegation. Accordingly, that delegation can only be deemed proper.

The irrebuttable presumption contained in section 921(c)(3) not only involves a presumption of the existence of pneumoconiosis but forecloses all fact finding as to the effect of that disease upon a particular coal miner upon a clinical finding of the presence of a chronic dust disease of the lung of a coal miner. The pattern adopted in section 921(c)(3) is a departure from the overall pattern of the Act which makes the existence of both the disease and disability two (2) separate factors which must be established before liability is imposed. The statutory definition of total disability involves factual issues distinct from clinical findings. 30 U.S.C. 902(f):

> The term "total disability" has the meaning given it by the regulation of the Secretary of Health, Education and Welfare, except that such regulation shall provide that a miner shall

> be considered totally disabled *when pneumoconiosis prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time.* Such regulation shall not provide more restrictive criteria than those applicable under section 223(d) of the Social Security Act. (Emphasis supplied)

To the extent that such presumption purports to making a finding of total disability in terms other than those provided by the Act as standards for total disability, it is unreasonable and arbitrary. As written, section 921(c)(3) is violative of due process in precluding the opportunity to present evidence as to the effect of a chronic dust disease upon an individual in determining whether or not he is disabled. *Heiner* v. *Donnan*, 285 U.S. 312, 329 (1932); *Stanley* v. *Illinois*, 405 U.S. 645 (1973); *Vlandis* v. *Kline*, 412 U.S. 441 (1973).

The final rebuttable presumption provided by section 921(c)(4) differs from all other statutory presumptions of section 921(c) in that it provides the standard "and, if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment", then the employment experience of fifteen (15) years together with such other evidence may be used to support a rebuttable presumption. In this construction "other evidence" of total disability would by traditional rules of statutory construction imply evidence of total disability within the meaning of the Act as opposed to a finding of total disability in every case solely upon clinical evidence of a chronic dust disease. Given this construction the presumption contained in section 921 (c)(4) passes constitutional muster. This presumption merely makes certain that a negative x-ray does not become conclusive evidence that there is no mine-related disability arising from pneumoconiosis.

Third, within the language of section 921(c)(4), but outside the enactment of the presumption itself, is the following:

> The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.

We declare this limitation upon evidence to rebut the presumption that such disability is due to pneumoconiosis established by section 921(c)(4) to be invalid as arbitrary and unreasonable. Congress has made no finding that pneumoconiosis *per se* is disabling. Quite to the contrary, Congress has recognized that the disease must produce total disability or death before any operator may be held liable for benefits. 30 U.S.C. 932. It has been judicially determined that pneumoconiosis, like any other disease, is not disabling per se. Cf. *Rose* v. *Cohen*, 406 F. 2d 753 (6th Cir. 1969); *Hall* v. *Weinberger*, No. 1375 (E.D. Ky. 1973), *aff'd mem.* No. 73-1871 (6th Cir. 1974). Since, under section 925, the operator is bound by the Secretary's finding of liability under Part B, the operator may attack the application of this limitation. To require rebuttal evidence that a coal miner did not have pneumoconiosis is irrational where liability is not predicated on the mere presence of the disease, but rather on a complicated state of the disease.

Further, the liability established under section 932 (c) specifically exonerates a coal operator of liability for benefits "which did not arise, at least in part, out of employment in such mine during the period when

it was operated by such operator". There is no rational basis upon which the burden of proving that the impairment "did not arise out of, or in connection with employment in a coal mine"[4] can be placed upon a specific potentially liable coal mine operator. Such operator must be found liable under the Act for his mine's involvement in the disease, if any.

Fourth, no basis is shown, and we can find none, upon which Congress may deprive a litigant of the right to produce whatever evidence may be admissible generally in attempting to rebut a presumption without offending due process.

We are persuaded that none of our holdings in this matter affect the facial constitutionality of the Act *per se.* Excising those matters found to be constitutionally offensive, we hold that the Act is left substantially unimpaired, and no essential part of the legislative plan has been attacked successfully.[5] The

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[4] It has been suggested that as section 932(c) provides that no benefit is payable by any operator for death or total disability which did not arise, at least in part, out of employment in a mine during the period when it was operated by such an operator, then the presumption dealt with in section 921(c)(4) could be construed, when applied to an operator's liability under Part C, to mean "employment in *its* coal mine" rather than "employment in *a* coal mine" as written. It is questionable whether this Court has the authority to so construe the plain language of an Act of Congress and, in this instance, declines to entertain the suggestion.

[5] We note that a similar but in part distinguishable case involving the Act and regulations is *National Independent Coal Operator's Association* v. *Brennan,* 372 F.Supp. 16 (D. D.C. 1974), affirmed without opinion, ——U.S.——, No. 73-1902, October 29, 1974. The opinion of the District of Columbia Court does not touch directly the matters found constitutionally objectionable in the instant case. The closest point of convergence is found in the *Brennan* decision's Conclusions of Law (v), 372 F.Supp. at 24:

"Pursuant to Sections 422(h) and 422(f)(2) of the Act, the Secretary of Labor properly promulgated regulations applying the Section 411 presumptions to Section 422 operator liability. Therefore, the *statutory provisions pursuant to which the Secretary's regulations were promulgated* do not and will not deprive the plaintiffs in No. 1711-73 of their property without due process of law or deny them equal protection of the law." (Emphasis added.)

This conclusion holds that sections 422(h) and (f)(2) are valid. It does not consider the validity of section 411(c) of the Act. Our consideration of these issues, therefore, is not precluded nor are the issues mooted by the decision of the Supreme Court.

Secretary shall no longer seek to apply the irrebuttable presumption made by section 921(c)(3) or to limit evidence in rebuttal to the presumption created in section 921(c)(4). All other provisions of the Act which have been considered are hereby declared to be permissible legislation under the Federal Constitution.

All matters raised in the pleadings which are outside the jurisdiction of this Court are retained for consideration by the requesting judge.

An order in conformity with this Memorandum Opinion shall be entered forthwith.

This the 19 day of November, 1974.

Entered by direction of the Court:

H. DAVID HERMANSDORFER,
Judge.

A true copy attest:

DAVIS T. MCGARVEY,
Clerk, U.S. District Court.
DOROTHY B. WOOD,
Deputy Clerk.

APPENDIX B

In the United States District Court for the Eastern District of Kentucky

Pikeville

Civil Action No. 1761

(Filed, Nov. 19, 1974, at Frankfort, Davis T. McGarvey, Clerk, U.S. District Court)

TURNER ELKHORN MINING COMPANY, A KENTUCKY CORPORATION, ET AL, PLAINTIFFS

v.

PETER J. BRENNAN, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR, AN AGENCY OF THE FEDERAL GOVERNMENT, AND CASPER W. WEINBERGER, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, AN AGENCY OF THE FEDERAL GOVERNMENT, DEFENDANTS

Notice is hereby given of the entry of this order or judgment on November 20, 1974, Davis T. McGarvey, *Clerk;* Dorothy B. Wood, *Deputy Clerk*

ORDER

In conformity with the Memorandum Opinion this date entered herein,

IT IS ORDERED AND ADJUDGED HEREIN AS FOLLOWS:

(1) That the irrebuttable presumption set forth in 30 U.S.C. 921(c)(3) and the limitation of evidence

necessary to rebut the presumption created in 30 U.S.C. 921(c)(4) are violative of the United States Constitution.

(2) That the Secretary of Labor shall no longer seek to apply the irrebuttable presumption made by 30 U.S.C. 921(c)(3) or to limit evidence in rebuttal to the presumption created in 30 U.S.C. 921(c)(4).

(3) That all other provisions of the Act which have been considered are permissible legislation under the Federal Constitution.

(4) That all matters raised in the pleadings which are outside the jurisdiction of the three judge court are retained for consideration by the requesting judge.

This the 19 day of November, 1974.

Entered by direction of the court:

H. DAVID HERMANSDORFER,
Judge.

A true copy attest:

DAVIS T. MCGARVEY,
Clerk, U.S. District Court.
DOROTHY B. WOOD,
Deputy Clerk.

APPENDIX C

In the United States District Court for the Eastern District of Kentucky

Pikeville

Civil Action No. 1768

TURNER ELKHORN MINING COMPANY, A KENTUCKY CORPORATION, ET AL., PLAINTIFFS

v.

PETER J. BRENNAN, SECRETARY OF LABOR, ET AL., DEFENDANTS

DEFENDANTS' MOTION TO AMEND JUDGMENT

Defendants move for reconsideration and to amend the order of the court filed November 19, 1974, [sic] for the following reason:

Plaintiffs did not specifically contest sections 411 (e)(3) or 411(e)(4) of the Federal Coal Mine Health and Safety Act, 30 U.S.C. 921(e)(3) and 921 (e)(4), insofar as this court ruled those sections unconstitutional. Accordingly, the brief of the government did not address the issues ruled on by the District Court. The government wishes to present argument to the District Court respecting its two rulings, upon a briefing scheduled to be determined by

the court, rather than appeal directly to the Supreme Court without full consideration of its arguments by the District Court.

Respectfully submitted,

EUGENE E. SILER, JR.,
United States Attorney.

DAVID ORLIKOFF,
Department of Justice.

FRANK A. WHITE,
Attorney, Department of Labor.

CERTIFICATE

I hereby certify that on the 2nd day of December, 1974, I served the foregoing Motion by causing copies thereof to be mailed post first class postage pre-paid to

STEPHEN A. MILWID, Esq.
R. R. MCMAHAN, Esq.
Lord, Bissell & Brook
135 South LaSalle Street
Chicago, Illinois 60603
and
JAMES M. GRAVES, Esq.
Bochl, Stopher, Graves & Deindoerfer
1 River Front Plaza
Louisville, Kentucky 40202

EUGENE E. SILER, JR.,
United States Attorney.

APPENDIX D

While the motion to amend the judgment was pending in the district court the defendants filed a motion for stay pending reconsideration or appeal. The memorandum in support of that motion, containing arguments applicable to both the motion to amend judgment and the motion for stay, is set out below.

In the United States District Court for the Eastern District of Kentucky

Civil Action No. 1761

TURNER ELKHORN MINING CO., ET AL., PLAINTIFFS
v.
PETER J. BRENNAN, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR, ET AL., DEFENDANTS

Memorandum in Support of Defendants' Motion For a Stay Pending Reconsideration or Appeal

PRELIMINARY STATEMENT

On November 20, 1974, this Court entered an order enjoining the defendant Secretary of Labor from seeking to enforce or apply the irrebuttable presumption contained in section 411(c)(3) of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, and the limitation of evidence clauses contained in section 411(c)(4) of such Act on the grounds that such provisions are violative of the United States Constitution.

It is appropriate for this Court to stay the effect of its order pending a reconsideration of the matters detailed herein or if such reconsideration is deemed unwarranted, pending a determination of these matters by the Supreme Court, since probable errors of fact and law are so manifest as to constitute improper grounds upon which to deprive, even temporarily, worthy black lung benefits claimants of the benefits provided for them under the Act.

ARGUMENT

1. The Court improperly declared the section 411(c)(3) presumption unconstitutional

A. This Court has declared the irrebuttable presumption contained in 30 U.S.C. 921(c)(3) (411(c)(3) of the Act) to violate the United States Constitution. The defendants submit that the issue of the constitutionality of section 411(c)(3) was not before the Court for determination.

Count II in plaintiffs' complaint in the instant case contains a detailed statement of those parts of section 411 of the Act alleged to be objectionable. In paragraph 9 of Count II plaintiffs enumerate verbatim from the statute those provisions at issue.[1] Section 411(1)(3) is not included in such enumeration. Nor is any mention made of 411(c)(3) at any other place in plaintiffs' complaint. Except for a description footnote on page 5 of plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion For Summary Judgment no mention is made of section 411(c)(3) in

[1] Plaintiffs' Complaint, p. 10.

plaintiffs' written arguments.[2] On May 2, 1974, this Court issued an order staying proceedings in the instant case pending a final determination of proceedings in *National Independent Coal Operators Association* v. *Brennan supra*, on the grounds that the issues in such case were "identical" to the issues in the instant case.[3] No question concerning section 411(c)(3) was present in the *National Independent* case and no mention of section 411(c)(3) was made by the Court in its decision in that case.

Defendants allege that they had no notice of the fact that the constitutional validity of section 411 (c)(3) was to be litigated in the instant case and accordingly were not granted an opportunity to be heard by this Court with respect to such issue.

It is a fundamental principle of law that:

> A court may not, without the consent of all persons affected, enter a judgment which goes beyond the claim asserted in the pleadings. [citations] * * * A party is no more entitled to recover on a claim not pleaded than he is to recover on a claim pleaded but not proved.

[2] The affidavit of E. T. Brown submitted by plaintiffs in support of their Motion for a Temporary Restraining Order presented September 24, 1974, mentions the fact that § 411(c)(3) was at issue in a case concerning plaintiff Alabama By-Products Corporation currently in the Department of Labor's administrative process. This passing mention of § 411(c)(3) within the context of another case hardly seems adequate to put defendants on notice that the section 411(c)(3) matter was at issue in the instant case.

[3] Notably, plaintiffs, in their Memorandum of Law in Opposition to Defendants' Motion for a Stay dated February 18, 1974, make no mention of § 411(c)(3). If plaintiffs felt § 411(c)(3) was at issue in their case, certainly this memorandum would have been the place to point out that fact since 411(c)(3) was clearly not at issue in the *National Independent* case.

Sylvan Beach Inc. v. *Koch*, 140 F. 2d 852, 861 (8th Cir. 1944). See also *Barnes* v. *Chicago, Milwaukee & St. Paul Ry.*, 122 U.S. 1, 14 (1887); *Armstrong Cork Company* v. *Lyons*, 366 F. 2d 206 (8th Cir. 1966); *Daniels* v. *Thomas*, 225 F. 2d 795, 797 (10th Cir. 1955); *cert. denied*, 350 U.S. 932.

As stated by the Supreme Court in *Standard Oil Co.* v. *Missouri*, 224 U.S. 270, 281–282 (1912), a court lacks jurisdiction to enter a judgment beyond what is justified by the pleadings:

> Even if a court has original general jurisdiction, criminal and civil, at law and in equity, it cannot enter a judgment which is beyond the claim asserted * * *.
>
> * * * * *
>
> [Such] judgments * * * would not be merely erroneous: they would be absolutely void because the court rendering them would transcend the limits of authority in those cases.

At page eight of its Memorandum Opinion in the instance case, this Court notes, "the pattern adopted in section 921(c)(3) is a departure from the overall pattern of the Act * * *." Defendants have had no notice or opportunity to be heard concerning the rationality of this "departure." The decision of this Court to strike down a provision of Federal law as violative of the Constitution without affording the parties affected an opportunity to make allegations and present arguments pertaining to such decision renders that portion of the decision a nullity.

B. If defendants were on notice that section 411 (c)(3) was an issue in the case, a demonstration of its validity would have been a simple matter. This Court has struck down section 411(c)(3) on the grounds that the irrebuttable presumption contained therein deprives an employer of the right to "present evidence as to the effect of a chronic dust disease upon an

individual in determining whether or not he is totally disabled."[4] It is true that 411(c)(3) purports to entitle an individual to benefits from his employer if such individual is a miner and is suffering from complicated or advanced pneumoconiosis, without reference to such individual's ability to continue working. Nonetheless, the presumption established by Section 411(c)(3) does not run contrary to the overall scheme of the Act in awarding benefits on the basis of total disability. In enacting this section, Congress legislated a fixed presumption that a miner whose lungs were wracked with massive lesions caused by black lung disease *is*, in the legislative judgment, *totally disabled* due to pneumoconiosis and should not be working, even though he may be able to perform some kinds of work. What is at issue here is a legislative judgment as to what constitutes total disability. Although the definition of total disability found in Section 402(f) of the Act may have general usage in other claims filed under the Act, there can be little doubt as to the constitutional power of Congress to qualify that definition for the benefit of those miners suffering from the physical affliction described and defined in Section 411(c)(3) of the Act. Thus, Congress has *not* awarded benefits on behalf of miners who are *not* totally disabled; Congress has only made a statement of law as to what constitutes total disability. Rather than doing so by the use of an "irrebuttable presumption," Congress could simply have added to the language of Section 402(f) to specify the physical condition now defined in Section 411 (c)(3). The manner of draftsmanship should not affect the validity of the Act.

Moreover, even if this Court were to construe Section 411(c)(3) as providing benefits for a condition less than "total disability," it has long been recog-

[4] Memorandum Opinion at 9.

less than "total disability," it has long been recognized that the legislature may authorize the recovery of such benefits from one's employer for less than totally disabling conditions. Compensation schemes of this sort, often termed "schedule benefits," are embodied in most State workers' compensation laws as well as in the Longshoremen's and Harbor Workers' Compensation Act.[5] Under such laws specified benefits are payable for certain employment related injuries or disabilities without regard to the injured employee's total or partial disability for work or loss of wages or wage earning capacity.[6]

Long ago the Supreme Court reviewed and approved the constitutionality of workmen's compensation provisions which provide benefits based solely upon medical facts to the exclusion of considerations of disability. In *New York Central R.R. Co.* v. *Bianc*, 250 U.S. 596, 602–603 (1919) the Supreme Court in sustaining a provision of New York law which provided compulsatory compensation benefits to an employee who suffered an employment-related facial disfigurement but no loss of ability to work held:

> [W]e cannot concede that impairment of earning power is the sole ground upon compulsatory compensation to injured workmen may be based. . . . [I]n our opinion the "due process of law" clause of the Fourteenth Amendment does not require the States to base compulsory compensation solely upon loss of earning power.
>
> * * * * *
>
> And we see no constitutional reason why a State may not, in ascertaining the amount of such compensation in particular cases, take into consideration any substantial physical impairment attributable to the injury, whether it immediately affects earning capacity or not.

[5] See 33 U.S.C. § 908(c).

[6] 2A Larsen, *Workmen's Compensation Law*, § 58.19, *et. seq.*

2. The Court improperly declared the limitations on evidence contained in section 411(c)(4) of the Act unconstitutional

In striking down the so-called limitations on the presentation of evidence tending to rebut the presumption contained in section 411(c)(4) of the Act this Court held that pneumoconiosis must cause total disability or death before a claimant's eligibility for benefits may be established and that to prohibit the presentation of evidence with respect to the question of total disability or death is unreasonable.[7] This question concerning *proof of total disability* within the context of 411(c)(4) was not raised as an issue by plaintiffs nor responded to by defendants in any of the papers filed in this action.

Section 411(c)(4) does not provide for a rebuttable presumption of total disability; it simply provides that where total disability from a respiratory or pulmonary impairment is otherwise proven, and where it can be shown that a miner has worked in a coal mine for fifteen years or more, there arises a rebuttable presumption that such total disability was due to pneumoconiosis. According to the plain language of Section 411(c)(4), proof of total disability from a respiratory or pulmonary impairment is a condition precedent to the operation of the rebuttable presumption contained therein. Thus, the rebuttable presumption that a miner's total disability or death arose from penumoconiosis arises *only*

> if a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest roentgenogram submitted in connection with such miner's, his widow's, his child's, his parent's, his brother's, his sis-

[7] Memorandum Opinion at 10.

> ter's, or his dependent's claim under this subchapter and it is interpreted as negative with respect to the requirements of paragraph (3) of this subsection, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment * * *

Thus, the clear purpose and effect of the rebuttable presumption of Section 411(c)(4) is to draw a causal relationship between the already proven total disability resulting from a respiratory or pulmonary impairment and a miner's fifteen years of employment in underground coal mines. The limitations upon overcoming the rebuttable presumption of Section 411(c)(4) set forth in the last sentence thereof do not preclude the operator from disproving total disability since total disability must be proved independently.[8] Operation of the rebuttable presumption is specifically conditioned upon prior proof of total disability and fifteen years' employment in underground mines. 20 C.F.R. § 410.422 adopted by the Secretary of Labor in 20 C.F.R. Part 718 provides that unless a miner establishes total disability by the irrebuttable presumption contained in 411(c)(3), such miner must *in all cases* prove the fact of his total disability pursuant to the criteria set forth in 20 C.F.R. 410.412, 410.422, 410.424,

[8] Although the first portion of Section 411(c)(4) makes it clear that the rebuttable presumption arises only after total disability is established, the remaining portion may have been more clearly drafted to read: "* * * then there shall be a rebuttable presumption that such total disability of a miner was due to pneumoconiosis, that his death was due to pneumoconiosis, or that such total disability at the time of a miner's death was due to pneumoconiosis." Read in context as whole, however, the provision leaves no doubt but that the rebuttable presumption relates to the causal connection between years of employment in the mines and a totally disabling respiratory and pulmonary impairment, and not the existence of total disability itself.

and 410.426. Conversely, these provisions do not limit an operator's ability to present evidence tending to disprove a miner's total disability.

It is axiomatic that a legislative enactment is to be afforded every intendment of constitutionality and, further, that any court, when reviewing such enactment in light of the Constitution, must read the language in question to comport with the requirements of the Constitution if such interpretation is a reasonable one. 2A Sutherland, *Statutory Construction*, § 45.11 (4th ed. 1973).

Moreover, the Supreme Court has repeatedly ruled that "[t]he administrative interpretation of the Act by enforcing agency is entitled to great deference," *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433–34 (1971), so that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong. * * *" *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 381 (1969). See also *National Labor Relations Board* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, 692 (1951); *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933). The construction and application of Section 411(c)(4) by the Secretary of Labor in his administration of Part C of the Act does not present the constitutional infirmities foreseen by this Court in its decision. Accordingly, the Court should recede from its previous interpretation of the Act in favor of the constitutional reading of section 411(c)(4) suggested by the Secretary.

3. *Certain claimants will suffer irreparable harm as a result of this Court's decision*

It is undeniable that as a result of this Court's decision an unknown number of claimant's will be denied benefits under the Act pending review of this Court's decision by the Supreme Court. The order of this Court prohibits the Secretary of Labor from applying both the Section 411(c)(3) presumption as well as the limitation on rebuttal evidence contained in Section 411(c)(4) under an interpretation of the latter section which the Secretary has never asserted before this Court or in the administration of Part C claims and which he specifically disclaims, for the Secretary's interpretation permits any relevant evidence on the issue of total disability itself to be considered initially. Nonetheless by memorandum dated December 2, 1974, operating personnel within the Department of Labor's Black Lung program have been instructed to comply with the order of this Court. It is estimated that as a result of such order at least 100 prospective black lung beneficiaries, all of whom are suffering from complicated pneumoconiosis but who cannot produce evidence of total disability within the meaning of this Court's decision, will be denied any and all benefits under the Act. Clearly, continued implementation of the Court's judgment, if such is premised upon a faulty construction of the Act, can only have a deleterious impact upon the administration of Part C claims.

CONCLUSION

In light of the foregoing, it is respectfully requested that this Court stay the operation and effect of its decision and order pending reconsideration of its de-

cision or if such reconsideration is deemed unwarranted, pending review by the Supreme Court.

Respectfully submitted,
WILLIAM J. KILBERG,
Solicitor of Labor.
MARSHALL H. HARRIS,
Associate Solicitor.
MARK E. SOLOMONS,
FRANK A. WHITE,
Attorneys,
U.S. Department of Labor.
PETER J. BRENNAN,
Secretary, U.S. Department of Labor.
Co-Counsel for Defendant.
CARLA A. HILLS,
Assistant Attorney General.
United States Attorney.
HARLAND F. LEATHERS.
DAVID ORLIKOFF.
ROBERT M. RADER,
Attorneys,
U.S. Department of Justice.
CASPAR W. WEINBERGER,
Secretary,
U.S. Department of Health, Education and Welfare,
Counsel for Defendant.
PETER J. BRENNAN,
Secretary, U.S. Department of Labor,
Co-Counsel for Defendant.

APPENDIX E

In the United States District Court for the Eastern District of Kentucky
Pikeville

Civil Action No. 1761

(Filed, Dec. 17, 1974, at Cailettsburg, Davis T. McGarvey, Clerk, U.S. District Court)

TURNER ELKHORN MINING COMPANY, A KENTUCKY CORPORATION, ET AL, PLAINTIFFS

v.

PETER J. BRENNAN, SECRETARY OF LABOR, ET AL., DEFENDANTS

Notice is Hereby Given of the Entry of this Order or Judgment on December 18, 1974, Davis T. McGarvey, *Clerk;* Dorothy B. Wood, District of Columbia, *Deputy Clerk*

ORDER

Defendants have moved to amend the judgment herein on the ground that they did not have an opportunity to argue or brief the questions considered and determined with respect to statutory presumptions, 30 U.S.C. 921(c)(3), 921(c)(4). Plaintiffs respond pointing out that defendants are out of time under Rule 58(c), F.R.C.P., but notwithstanding that the Court has reconsidered the substantive aspects of defendants' motion, and the Court being sufficiently advised,

IT IS ORDERED that defendants' motion to amend the judgment be, and the same hereby is, OVERRULED for the reason that defendants did brief the questions raised by plaintiffs in their brief filed April 10, 1974 at pages 83 and following.

IT IS FURTHER ORDERED that the ruling herein made be considered a rule under Rule 54(b), F.R.C.P. for purposes of appeal inasmuch as aspects of a controversy have been found to be in the jurisdiction of a single judge court and could not, therefore, be considered by the three judge court which has entered its determination and this Order.

This the 17th day of December, 1974.

Entered by direction of the Court:

H. DAVID HERMANSDORFER,
Judge.

A true copy attest:

DAVIS T. MCGARVEY,
Clerk, U.S. District Court.
DOROTHY B. WOOD,
Deputy Clerk.

APPENDIX F

In the United States District Court for the
Eastern District of Kentucky
Pikeville

Civil Action No. 1761

TURNER ELKHORN MINING COMPANY, ET AL.,
PLAINTIFFS
v.
PETER J. BRENNAN, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR, AND CASPAR W. WEINBERGER, SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, DEFENDANTS

Notice of Appeal, Filed January 16, 1975

Notice is hereby given that the Secretary of Labor and the Secretary of Health, Education and Welfare, defendants above named, hereby appeals to the Supreme Court of the United States from the final order of the district court entered on December 17, 1974, denying the defendant's motion filed December 2, 1974 to amend the district court's order entered on November 20, 1974.

This appeal is taken under Title 28, United States Code, Sec. 1253.

This 16th day of January, 1975.

EUGENE E. SILER, JR.,
United States Attorney.
JOHN M. COMPTON,
Assistant United States Attorney.

APPENDIX G

In the United States District Court
for the Eastern District of Kentucky
Pikeville

Civil Action No. 1761

TURNER ELKHORN MINING COMPANY, ET AL., PLAINTIFFS

v.

PETER J. BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, ET AL., DEFENDANTS

MEMORANDUM OPINION AND ORDER

(Filed January 22, 1975)

This matter is before the Court upon the defendants' motion, pursuant to Rule 62, Federal Rules of Civil Procedure, and Rule 8, Federal Rules of Appellate Procedure, for a stay of the injunction heretofore entered herein pending defendants' appeal to the United States Supreme Court from the Order of this Court granting said injunction. The plaintiffs have filed a memorandum in opposition to the defendants' motion.

The defendants predicate their motion for a stay upon three (3) grounds which are as follows:

(1) The substance of this Court's Order of November 20, 1974 in respect to the constitutionality of 30 U.S.C. 921(c)(3) determines a matter not at issue in the case and about which they have not been af-

forded notice or an opportunity to present evidence is contrary to the law;

(2) The substance of such Order with respect to the constitutionality of the limitation on the presentation of evidence contained in 30 U.S.C. 921(c)(4) is based upon an erroneous construction of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. 801 *et seq.*; and,

(3) The injunction issued by this Court against the defendant Peter J. Brennan may result in irreparable and inestimable harm to certain individuals properly entitled to benefits under Subchapter IV of the Act.

Upon a consideration of the entire record, the defendants' motion will be overruled for the reasons set forth below.

The defendants' first basis for the relief sought amounts to a request for the Court to revisit its decision of December 17, 1974 overruling their motion for reconsideration. That invitation is declined as the Court finds the present argument advanced by the defendants to be remarkable in view of the contentions raised in their brief filed April 10, 1974, pp. 83–90.

Under a major subheading of that brief entitled "The Medical Standards and Presumptions Meet the Requirements of Equal Protection and Due Process of Law" the defendants specifically asserted the contention that Congress did not exceed the bounds of due process in enacting the presumptions contained in Subchapter IV of the Act. Furthermore, they argued that:

> * * * when viewed in light of the applicable case concerning the rationality of 'presumptions', those presumptions contained in section 411(c) of the Act (30 U.S.C. 921(c)) appear both reasonable and proper. (Defendants' Brief filed April 10, 1974, p. 86.)

Even upon an assumption that this issue was not raised in the pleadings, Rule 15(b), Federal Rules of Civil Procedure, would permit amendment of the same to encompass all issues raised before the Court, either expressly or impliedly.

The remaining alleged bases for granting of a stay shall be jointly considered and under the guidelines generally adopted by various courts for determining whether such relief should be granted. See, *7 Moore's Federal Practice,* ¶62.05 (2d ed. 1974).

First, the defendants have failed to make a strong showing that they are likely to prevail upon appeal. This Court based its judgment in reference to the unconstitutionality of certain aspects of the Act upon a careful consideration of established binding precedent. The defendants' argument suggests that the Supreme Court stands ready to depart from their announced position but no basis is found for that proposition.

Second, the defendants have not established that irreparable harm will result unless a stay is granted. Traditionally, the irreparable injury envisioned by Rule 62(c), Federal Rules of Civil Procedure, is one that presently threatens a litigant and does not harm something that the litigant fears will happen in the future. *Eastern Greyhound Lines* v. *Fusco,* 310 F. 2d 632, 634 (6th Cir. 1962).

Here, the defendants do not contend that they will suffer any present harm but, rather, that certain claimants under the Act will be denied benefits pending this appeal. However, this argument assumes the validity of the specified statutory presumptions and that the Secretary of Labor cannot, by exercise of his inherent powers suspend further administrative proceedings pending appellate review of this Court's decision. They further fail to recognize the nature of the

limitation placed upon the Secretary by the grant of injunctive relief. A miner suffering from complicated pneumoconiosis, if totally disabled by the disease, should have no particular problem in obtaining medical opinion evidence to that effect. In addition, it must be noted that the defendants have failed to demonstrate more than a prospective monetary injury to claimants under the Act. Damages of this nature do not constitute any basis for a stay of the injunction heretofore granted. *Eastern Greyhound Lines, Id.* at 654.

Finally, the defendants' motion for a stay fails to demonstrate how the public interest may be harmed should the stay not be granted.

Accordingly, IT IS ORDERED that the defendants' motion for a stay of the injunction issued on November 20, 1974 be, and it hereby is, OVERRULED.

This the 22 day of January, 1975.

By direction of the court:

H. DAVID HERMANSDORFER,
Judge.

A true copy attest:

DAVIS T. MCGARVEY,
Clerk, U.S. District Court.
LINDA L. YOUNG,
Deputy Clerk.

U.S. GOVERNMENT PRINTING OFFICE: 1976